(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CRIMINAL APPEAL NO. 1003 /2002

APPELLANT
(Appellant is in jail)

: Jitu @ Jeevan Nishad, S/o Baburam Nishad, aged 20 years, R/o Village – Gandadeeh, Police Station – Dhamdha. Present Address – Muktidham, Gayanagar, Durg (C.G.)

-VERSUS-

RESPONDENT

: State of Chhattisgarh through Station House Officer, Kotwali Police Station, District Durg (C.G.)

3655 d on 17/9/09 by Ramesh Sharma Advocate

to D.R.(J) 17/09

APPEAL U/S 374 (2) OF THE CODE OF CRIMINAL PROCEDURE

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मामला क्रमांक G.A.908/02, 1003/02, 100/ सन् 2003

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
		Criminal Appeal No.908 of 2002
	APPELLANT: (In Jail)	Shrawan Kumar, S/o Bhuwan Das Sahu, Aged about 20 years, R/o Before Mukti Dham, Gaya Nagar, Durg, Tah. & Distt. Durg (C.G.)
		- Versus -
	RESPONDENT:	State of Chhattisgarh.
		Criminal Appeal No.1003 of 2002
	APPELLANT: (In Jail)	Jitu @ Jeevan Nishad, S/o Baburam Nishad, Aged 20 years, R/o Village: Gandadeeh, Police Station: Dhamdha, Present Address: Muktidham, Gayanagar, Durg (C.G.)
		- Versus -
	RESPONDENT:	State of Chhattisgarh Through Station House Officer, Kotwali Police Station, District Durg (C.G.)
		AND

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

~~Criminal Appeal No.100 of 2003~~

APPELLANT/:
(Accused)

Jani Yadav, aged about 20 years,
S/o Baiga Yadav, Mukti Dham,
Gaya Nagar, Durg (C.G.)

- Versus -

RESPONDENTS:

1. State of Chhattisgarh
Through P.S. Durg.

2. Jeet alias Jeevan Nisad,
Aged about 20 years,
S/o Baburam Nisad,
R/o Village Gadadih,
Thana Dhamda,
Present address Muktidham
Gayanagar, Durg,
Distt. Durg (C.G.)

3. Shrawan Kumar,
Aged about 20 years,
S/o Bhubandas Sahu,
R/o Village: Makhul,
Thana: Churiya,
Distt. Rajnandgaon,
Present address Muktidham
Gayanagar, Distt.Durg (C.G.)

(Appeals under Section 374 (2) of the Code of Criminal Procedure)

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आदेश पत्रक (पूर्वानुबद्ध)

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Division Bench: Hon'ble Mr. L.C. Bhadoo and Hon'ble Mr. Sunil Kumar Sinha, JJ.

12-11-2007

Mr. N.S. Dhurandhar, counsel for the appellant in Cr.A. No.908/2002.

Mr. V.C. Ottalwar, counsel for the appellant in Cr.A.No.1003/2002.

Mr. Anand Kumar Tiwari, counsel for the appellant in Cr.A. No.100/2003.

Mrs. Anju Ahuja, Deputy Govt. Advocate for the State/ respondent.

Oral judgment dictated on *Dais*.

L.C. BHADOO, J.

1. Cr.A.No.908/2002 filed by Shrawan Kumar, Cr.A.No.1003/2002 filed by Jitu @ Jeevan Nishad and Cr.A.No.100/2003 filed by Jani Yadav are being disposed of by this common judgment, as all these three appeals are arising out of the same incident and same judgment dated 31-7-2002 passed by the 1st Additional Sessions Judge, Durg in Sessions Trial No.62/2000.

2. By these appeals, the appellants have questioned legality and correctness of the judgment of conviction and order of sentence dated 31-7-2002 passed by the 1st Additional Sessions Judge, Durg in Sessions Trial No.62/2000 whereby & whereunder learned Additional Sessions Judge

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~~after holding the accused/appellants guilty for commission of~~ offence under Section 302 read with Section 34 of the I.P.C., for committing the murder of one Radheyshyam Singh, sentenced each of the accused to undergo imprisonment for life and pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for six months.

3. Case of the prosecution, in brief, is that on 11-9-1999 Nakul Singh (PW-4) came to the house of Toran Singh where Toran along with his brother Radheyshyam (since deceased) were consuming their meals, after meal was over, all the three left for Gora square of Gaya Nagar in order to chew Gutkha. Near Gora square, accused Jani Yadav, Jeetu Nishad, Udayram Nirmalkar (juvenile) & Shrawan Kumar Sahu met them holding sword, Gupti & knife and on account of old animosity, all the four attacked Radheyshyam with the weapons they were carrying. Toran & Nakul tried to intervene, on which Jeetu Nishad, the appellant herein, rushed towards them, therefore, they ran away in the nearby street. All the four accused persons attacked the deceased with the weapons they were carrying and they fled away from the scene of occurrence. Thereafter, Toran & Nakul again came on the scene of occurrence and saw injured Radheyshyam, blood was oozing out of his injuries and he was already dead. After hearing the commotion, Mobin Khan & Raja Shukla reached on the spot.

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आदेश पत्रक (पूर्वानुबद्ध)

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4.	The matter was reported by Toran Singh (PW-3) under Ex.P-8 on the same day at about 8.30 p.m. in Police Station: Durg. He also gave merg intimation Ex.P-9. R.P. Shukla (PW-8) after recording merg intimation and registering the case under Ex.P-8, requested the Tahsildar under Ex.P-22 for preparing the site map. In the mean time, M.D. Tiwari (PW-9), Inspector, received message on wireless set that four boys have attacked one person with knife, sword & Churi, therefore, he reached on the spot immediately and saw the body lying in front of the house of Vinod Agrawal. He prepared inquest Ex.P-10 on the body of Radheyshyam and also prepared the site plan Ex.D-1. He seized bloodstained soil, plain soil, black colour torn shirt stained with blood containing two rupees note in its pocket, one broken piece of wood of the handle of sword covered with plastic stained with blood and one iron piece of handle of the sword stained with blood. While in police custody, piece of sword was seized from accused Shrawan Kumar under Ex.P-12, one sword was seized from accused Jeevan Nishad under Ex.P-13 and one sword & one knife were seized from accused Jani Yadav under Ex.P-14. Clothes of accused Jani Yadav, Jeetu & Shrawan were seized under Exs.P-18, 19 & 20, respectively. One sword was seized from accused Udayram Nirmalkar (juvenile) under Ex.P-15. Body of the deceased was sent for post-mortem examination to Government Hospital, Durg, where post-mortem was conducted by Dr. A.P. Sawant (PW-2). He	

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आदेश पत्रक (पूर्वानुबद्ध)

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prepared injury report Ex.P-2 and noticed as many as 77 injuries caused by sharp edged weapons on almost every part of the body. Seized articles were sent to Forensic Science Laboratory, Raipur under Ex.P-28 from where report Ex.P-29 was received.

5. After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Durg, who in turn committed the case to the Sessions Judge, Durg from where learned 1st Additional Sessions Judge, Durg received the case on transfer for trial.

6. The prosecution in order to establish charges against the accused persons examined nine witnesses. Statements of each of the accused were recorded under Section 313 of the Cr.P.C. in which each of the accused either denied or pleaded innocence about the material appearing against them in the prosecution evidence and stated that he is innocent and has been falsely implicated in the crime. The accused persons examined two defence witnesses namely, Dinesh Belchandan (DW-1) & Pawan Kumar Sinha (DW-2).

7. Earlier, Mr. N.S. Dhurandhar & Mr. V.C. Ottalwar, learned counsel for Shrawan Kumar & Jitu @ Jeevan Nishad, respectively, stated that relatives of the accused persons have taken file from them. Therefore, notice was sent to the accused persons for making arrangement for representation on

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their behalf and for arguing the appeals. Thirty days' time was allowed and it was further directed that if no counsel is engaged by the accused persons, Mr. N.S. Dhurandhar & Mr. V.C. Ottalwar will be asked to argue the appeals, as the accused persons are in jail since 1999. Registry sent communications to the accused persons which were served upon them on 4-10-2007, but no response has been received till today. Therefore, Mr. N.S. Dhurandhar & Mr. V.C. Ottalwar were asked to argue the appeals. Their arguments were heard. We have also heard Mr. Anand Kumar Tiwari, learned counsel on behalf of accused Jani Yadav and Mrs. Anju Ahuja, Deputy Govt. Advocate on behalf of the State/respondent.

8. So far as homicidal death of Radheyshyam is concerned, same has not been disputed by learned counsel for the appellants. Moreover, Dr. A.P. Sawant (PW-2) has stated in his evidence that on 12-9-1999 he was working as Medical Officer in District Hospital, Durg, and on that day, he conducted post-mortem on the body of Radheyshyam. He has stated that as many as 77 incised & cut wounds were found on the body of Radheyshyam almost on every part of the body. As per his evidence, windpipe was found cut, trachea was also cut, internal parts of neck were cut, there was fracture of mandible bone at three places, right side 2nd, 3rd, 4th, 7th & 9th ribs were fractured, 3rd rib of left side was fractured, sternum was fractured, right clavicle was fractured and three fingers of right hand were separated.

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~~There was blood in the floral cavity. There was incised wound on r~~ight lung & left lung. Right & left part of heart was ruptured. Stomach was ruptured at three places. Small & large intestines were ruptured at three places. There were cut injuries on liver & spleen. Kidney was pale. Injuries were ante-mortem in nature and cause of death was shock & haemorrhage as a result of cumulative effect of cut injuries. Death was homicidal in nature. In view of the above medical evidence and post-mortem report, it is established that the death of Radheyshyam was homicidal in nature.

9. As far as complicity of the accused persons in the crime in question is concerned, Mr. Anand Kumar Tiwari argued that in this case all the three eyewitnesses namely, Toran Singh Rajput (PW-3), Nakul Singh (PW-4) and Mobin Khan (PW-5) are interested witnesses, because, Toran is brother of deceased Radheyshyam, Nakul is friend of Toran and Mobin Khan happens to be tenant of Toran & Radheyshyam. The incident took place in the street at about 7.45 p.m., there was movement of public on the road and no independent witness has been examined. Therefore, no explicit reliance can be placed on the evidence of these eyewitnesses. He further argued that these witnesses have not clearly stated as to which accused assaulted which injury, omnibus evidence has been given, therefore, based on such weak evidence, the accused persons have been wrongly convicted. Mr. V.C. Ottalwar argued that as per the evidence of Nakul Singh (PW-4) the

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	accused persons were already in the Police Station before the report was lodged, how these accused persons were arrested in advance is not clear from the prosecution evidence. He further argued that the prosecution has failed to prove that the first information report was sent to the Chief Judicial Magistrate, Durg. In view of the above facts, the accused persons are entitled to the benefit of doubt particularly, when it has come in evidence that deceased Radheyshyam was a person of criminal record, therefore, possibility cannot be ruled out that on account of his criminal antecedents, he might have been attacked by some unknown persons and the accused persons have been implicated in the crime. Mr. N.S. Dhurandhar, learned counsel appearing on behalf of accused Shrawan Kumar, adopted the arguments of Mr. Anand Kumar Tiwari & Mr. V.C. Ottalwar.	
	10. On the other hand, Mrs. Anju Ahuja, learned Deputy Govt. Advocate, supported the judgment of the trial Court.	
	11. It is admitted position that conviction rests on the testimony of Toran Singh Rajput (PW-3), Nakul Singh (PW-4) and Mobin Khan (PW-5). As far as recovery of sword is concerned, both the eyewitnesses have stated that sword was already present in the Police Station. It is not a case where recovery of sword has been made at the instance of the accused. It is also admitted position that Toran is brother of deceased Radheyshyam,	

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~~whereas Nakul is friend of Toran and Mobin Khan happens to be t~~enant of Toran prior to the incident.

12. Now, the law is well settled that testimony of a witness cannot be rejected merely on the ground that the witness is relative of the victim, but the same has to be scrutinized with care and circumspection. In the matter of **Rizan and another vs. State of Chhattisgarh, through the Chief Secretary, Govt. of Chhattisgarh, Raipur**[1] the Apex Court held that the relationship is not a factor to affect credibility of a witness. It is more often than not a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such a case, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible. Similar view has been taken by the Apex Court in the matter of **Namdeo vs. State of Maharashtra**[2].

13. As far as the evidence of Mobin Khan (PW-5) is concerned, Toran Singh (PW-3) in para 2 of his evidence has stated that the accused persons attacked his brother and his brother fell down in front of the house of Vinod Agrawal, in the mean time, Mobin & Raja reached on the spot. Nakul Singh (PW-4) in para 19 of his evidence has stated that it is correct to say

[1] AIR 2003 SC 976
[2] 2007 AIR SCW 1835

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that Mobin & Raja came on the spot after the Police already reached there. Moreover, Mobin Khan (PW-5), who is once said to be the tenant of Toran & Radheyshyam, in para 2 of his evidence has stated that at about 7-8 p.m. when he was returning to Girdhari Nagar, he saw that near Gora square four persons were attacking one person with sword, after the incident he came to know the name of the victim as Radheyshyam. Once upon a time when this witness was already tenant of Toran, then how he has said that he came to know the name of the victim after the incident. Even though this witness has denied the suggestion in the cross-examination that it is incorrect to say that he reached on the spot after the attack was already over and the accused persons fled from the scene of occurrence, but the evidence of Toran Singh (PW-3) & Nakul Singh (PW-4) which has been referred above, makes it clear that this witness in fact reached the spot after the incident was already over. Therefore, reliance cannot be placed on the evidence of this witness (PW-5) that in fact, he witnessed the attack made by the accused persons on victim Radheyshyam that leaves us to scrutinize the evidence of Toran Singh (PW-3) & Nakul Singh (PW-4).

14. Toran Singh (PW-3) has stated in his evidence that on the fateful day at about 7.30 p.m. he along with his brother Radheyshyam was consuming meals at their residence, at that time, Nakul Singh came there and after consuming meals they left for Gora square for chewing Gutkha.

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	At that time, accused Jeetu, Jani, Shrawan and one boy came with sword and attacked his brother, when he along with Nakul tried to intervene, Jeetu Nishad rushed towards them holding sword in his hand and said that he will kill them, therefore, they started crying 'save save' and ran towards the street. He has further stated that the accused persons attacked the deceased on neck, chest, stomach and other parts of the body, as also on head, as a result of which his brother fell down in front of the house of Vinod Agrawal. He saw that his brother's body was movement-less, he was already dead, in the mean time, the Police came on the spot and took the body of his brother to the hospital where he was declared brought dead. He went to the Police Station and lodged report Ex.P-8. 15. Nakul Singh (PW-4) has corroborated the evidence of Toran Singh (PW-3) in material particulars. The matter was reported at about 8.30 p.m. within 45 minutes of the incident and the Police Station is at a distance of about 1 ½ kms. from the place of occurrence. The matter was reported promptly. In cross-examination of these two witnesses, defence has not been able to elicit any circumstance on any material point which discredits the evidence of these witnesses. These two witnesses have been confronted with their police case diary statements, but no material contradiction or omission has been found in their testimony. Their evidence is corroborated by the immediately lodged F.I.R. Ex.P-8 in which names of all the assailants and	

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weapons used by them are categorically mentioned. Nature of injuries mentioned in the post-mortem report and the evidence of Dr. A.P. Sawant (PW-2) establish that as many as 77 external injuries in the nature of incised or cut wounds have been found on vital organs of the body as well as other parts of the body. Ribs were fractured, sternum was fractured, heart, spleen, lungs, intestines were cut, even windpipe and most of the veins & muscles of neck were also cut. Moreover, the accused persons were arrested along with the weapons immediately after the incident by a patrolling police party and they were immediately taken to the Police Station where sword and everything were seized. All these factors and circumstances corroborate the testimony of Toran Singh (PW-3) & Nakul Singh (PW-4).

16 Coming to the argument of Mr. Anand Kumar Tiwari that these witnesses (PW-3 & PW-4) have not stated as to which accused inflicted which injury, in fact as per their evidence all the four accused persons started attacking the deceased mercilessly with deadly weapons and when they tried to intervene, accused Jeetu rushed towards them and said that he will kill them, therefore, they ran into the street. The attack made by the four accused persons with deadly weapons like sword etc. was so sudden that in such a situation, it is difficult for any one to memorize or distinctly notice with precision as to which accused attacked the deceased on which

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part of the body. On this count, we do not find any infirmity on the evidence of these witnesses.

17. As regards the argument of Mr. V.C. Ottalwar that Nakul Singh (PW-4) has stated in his evidence that when they reached Police Station, the accused persons were already sitting outside the lockup, the prosecution has not brought on record that how these persons arrested. M.D. Tiwari (PW-9), Inspector, in para 19 of his evidence has stated that the accused persons were taken into custody by patrolling police party of Pulgaon and they brought them to Police Station: Durg. He has also stated that he himself received message on wireless about the attack made on one person by four persons and he reached the spot. From his evidence it is clear that when the Police received message regarding the attack, they immediately flashed the message to all the police patrolling parties, the patrolling party of Pulgaon caught the accused persons with the weapons and brought them to the Police Station. Therefore, they were in Police Station, as such, we do not find any substance in this argument.

18. Now coming to the other point raised by Mr. V.C. Ottalwar that the F.I.R. was not sent to the Chief Judicial Magistrate, Durg, perusal of the F.I.R. (Ex.P-8) shows that there is an endorsement that on the same day, copy of F.I.R. was sent to the C.J.M. Moreover, this point was not raised before

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	the trial Court. Copy of the F.I.R. sent by the Police is available on record of the trial Court. PW 8 who recorded the F.I.R. has not been cross-examined on this aspect that the F.I.R. was not sent to the C.J.M. and he has not been given any opportunity to explain by cross-examination. Receipt to show that the F.I.R. was sent to the C.J.M. is available on 'B' file of the trial Court. Therefore, it cannot be said that copy of the F.I.R. was not sent to the C.J.M.	
	19. No other points were raised by learned counsel for the appellants.	
	20. In view of the above evidence of prosecution witnesses, evidence of Dinesh Belchandan (DW-1) & Pawan Kumar Sinha (DW-2) is of no help to the accused/appellants. Moreover, learned counsel for appellants has not argued on this aspect of matter.	
	21. For the foregoing reasons, we do not find any illegality or infirmity in the judgment of the trial Court convicting the accused persons for commission of offence under Section 302 read with Section 34 of the I.P.C.	
	22. In the result, the appeals are devoid of merit, they are liable to be dismissed and are hereby dismissed.	
Soma	Sd/- L.C.Bhadoo Judge	sd/- Sunil Kumar Sinha Judge